88-1679

Supreme Court, U.S.
FILED
APR 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

BRYAN N. WAS, ET AL.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES A. MAGLIERI
Counsel of Record
BARALL AND MAGLIERI
40 Wintonbury Mall
Bloomfield, CT 06002
(203) 242-0771

F. MAC BUCKLEY
Counsel of Record
BUCKLEY AND SANTOS
51 Russ Street
Hartford, CT 06106
(203) 249-6548

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

Whether or not the United States Court of Appeals for the Second Circuit erred in affirming the district court's denial of Petitioner's Motion to Dismiss Counts One, Two, and Three of a Four-Count Indictment. The Petitioner argued to the trial court as a matter of law and of first impression that:

(1) A gun part, i.e., an AR-15 auto sear, although made up of component pieces, cannot be deemed to be "any combination of parts designed and intended for use in converting a weapon into a machinegun" 26 U.S.C. Section 5845(b) (1982); and

(2) The Statute, Section 5845(b), is fatally ambiguous because it requires one to speculate as to its meaning and thus violates the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT PURSUANT TO RULE 17(c) OF THE SUPREME COURT RULES OF PROCEDURE 6

ARGUMENT 7

(A) THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS IN THAT: 7

(1) A gun part, i.e., an AR-15 auto sear, although made up of component pieces, cannot be deemed to be "any combination of parts designed and intended for use in converting a weapon into a machinegun" 26 U.S.C. Section 5845(b) (1982) 7

(2) The Statute, Section 5845(b), is fatally ambiguous because it requires one to speculate as to its meaning and thus violates the Due Process Clause of the Fifth Amendment 11

CONCLUSION 14

APPENDIX 1A

TABLE OF AUTHORITIES

Cases: **Page(s)**

Dunn v. United States, 442 U.S. 100 (1979) 12, 13

Kolender v. Lawson, 461 U.S. 352 (1983) 12

United States v. Anzalone, 766 F.2d 676 (1985) 12, 13

United States v. Bass, 404 U.S. 336 (1971) 12, 13

United States v. Cohen Grocery Co., 255 U.S. 81 (1921) 13

United States v. Was, 684 F. Supp. 350 (1988) 2

Legal Publications:

21 Am.Jur. Criminal Law Section 15 (1969) 12

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

BRYAN N. WAS, ET AL.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the order for the United States Court of Appeals for the Second Circuit entered in this proceeding on February 13, 1989.

OPINION BELOW

The District Court issued its ruling denying Petitioner's Motion to Dismiss Counts One, Two and Three of the Indictment on April 25, 1988 and that ruling is reported at 684 F. Supp. 350 (1988).

The United States Court of Appeals for the Second Circuit issued its opinion, affirming the District Court's ruling, on February 13, 1989 and that opinion is reported at Nos. 769, 890 August Term, 1988 (opinion not given official cite prior to filing).

Both the District Court's ruling and the Court of Appeal's affirmation of said ruling are reprinted in the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was rendered on February 13, 1989. The petition for Writ of Certiorari was filed within sixty (60) days of the Judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

A. 26 U.S.C. 5845(b) (1982):

(b) Machinegun.
The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, **any combination of parts designed and intended for use in converting a weapon into a machinegun,** and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

B. U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

C. U.S. Const., Art. I, Sec. 9, Cl. 3:

No Bill of Attainder or **ex post facto Law shall be passed.**

STATEMENT OF THE CASE

The Petitioner, Bryan N. Was,[1] was indicted on December 23, 1987 for conspiring to sell, sale and possession of firearms in violation of 26 U.S.C. Sections 5845(b), 5861(e), 5871, and 18 U.S.C. Section 371 (1982). Count One of the Indictment alleged that the Petitioner conspired to transfer three "auto sears" in violation of 26 U.S.C. Section 5845(b), 5861(e), 5871, and 18 U.S.C. Section 371. Counts Two and Three of the Indictment alleged that the Defendant transferred firearms (machineguns) as defined in 26 U.S.C. Section 5845(b), without payment of the transfer tax required by 26 U.S.C. Section 5811 (1982) and without filing the application for the transfer of such weapons with the Secretary of Treasury as required by 26 U.S.C. Section 5812 (1982). Count Four alleged that the Petitioner was in the unlawful possession of an unregistered firearm (machinegun) as defined by Section 5845(b), in violation of Sections 5861(e) and 5871.

On February 9, 1988, Petitioner moved to dismiss Counts One, Two, and Three of the Indictment pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure. The Petitioner averred that these charges failed to state an offense for which he may be prosecuted because, as a matter of law, the sale of a gun part, i.e., an AR-15 auto sear, did not constitute the sale or transfer of a machinegun as that term is defined in Section 5845(b). Memoranda of Law were filed in support and in opposition to the Motion to Dismiss by Petitioner and the United States, respectively.

On April 25, 1988, the Honorable Peter C. Dorsey, District Court Judge, ruled against Petitioner and denied the Motion to Dismiss. The District Court Judge ruled that as

---

[1] Bryan N. Was was indicted along with his father, the co-Defendant, Norman Was. For purposes of this Writ, Norman Was is co-Petitioner, along with Bryan N. Was, as he was co-Appellant at the United States Court of Appeals for the Second Circuit and co-Defendant at the trial court level.

a matter of law an AR-15 auto sear was in fact a machinegun, as defined in Section 5845(b), because it was made up of component pieces, which when combined together, formed a single gun part which was capable of converting a weapon into a machinegun, and further ruled that the statute defining machinegun was not ambiguous to render it void despite the fact that it was susceptible to two different but equally plausible interpretations: one resulting in proscribing Petitioner's activities as illegal, and the other not bringing it within the statute's proscription.

On July 12, 1988, the Defendant, Bryan N. Was, entered conditional pleas of guilty to Counts One and Two of the Indictment pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, thus reserving the right on appeal from judgment to review the adverse ruling on the Defendant's Motion to Dismiss.

The Defendant, Bryan N. Was, was sentenced on September 13, 1988, pursuant to his conditional pleas of guilty entered on Counts One and Two of the Indictment. Counts Three and Four of the Indictment were dismissed at the date of sentencing. Notice of Appeal was filed by the Defendant in the district court on September 22, 1988.

On February 13, 1989, the United States Court of Appeals for the Second Circuit, *per curiam*, affirmed the denial of Petitioner's Motion to Dismiss for substantially the same reasons stated in the opinion of the district court, reported at 684 F. Supp. 350 (1988). The opinion of the Court of Appeals is reproduced in the Appendix.

REASONS FOR GRANTING THE WRIT PURSUANT TO RULE 17(c) OF THE SUPREME COURT RULES OF PROCEDURE

A. The question presented is a matter of federal law and one of first impression. It has not been previously resolved by any court of the United States. It pertains to the interpretation of a criminal statute which is susceptible to two equally plausible, but inconsistent, interpretations with different results regarding criminality.

B. The phrase "any combination of parts designed and intended for use in converting a weapon into a machine-gun," (Section 5845(b)), is fatally ambiguous and requires speculation as to its meaning. The Court of Appeals by failing to hold that said statute is vague and/or ambiguous, and thus in violation of the Due Process Clause of the Fifth Amendment, decided a question of federal law in a way which conflicts with established precedent of this Court and with precedent of lower federal courts.

ARGUMENT

(A) THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS IN THAT:

(1) A gun part, i.e., an AR-15 auto sear, although made up of component pieces, cannot be deemed to be "any combination of parts designed and intended for use in converting a weapon into a machinegun" 26 U.S.C. Section 5845(b) (1982).

Congress upon enacting 26 U.S.C. Section 5845(b) defined machinegun, in relevant part, to include "any combination of parts designed and intended for use in converting a weapon into a machinegun." The Petitioner possessed, transferred and sold several AR-15 "auto sears." Petitioner maintained that as a matter of law, this gun part is a single gun part and not a combination of parts as that phrase is used in Section 5845(b). The argument of Petitioner to the trial court raised a question of law of first impression which presented significant jural implications for Petitioner and for those who are similarly situated. Petitioner relied on a plain reading and reasonable interpretation of the statute in attempting to conform his behavior to the terms of the law; despite this attempt, the Government prosecuted Petitioner for acts that Petitioner could not have known, nor could have been reasonably expected to know, were illegal and prosecution was likely.

The district court judge reasoned that, since the auto sear is physically made up of more than one piece, it cannot be excluded from the ambit of the statute. (Appendix page 12A). Further, the judge concluded that, as a matter of law, the gun part was a combination of parts which was designed and intended for use in converting a weapon into a machinegun. Petitioner maintained that although the auto sear was comprised of component pieces, it, when assembled, consti-

tuted a single gun part which cannot in and of itself constitute "any combination of parts designed and intended to convert a weapon into a machinegun." The AR-15 auto sear may convert a weapon into a machinegun if it is placed into a firearm in combination with other gun parts; however, the single auto sear cannot convert a weapon into a machinegun without being accompanied by additional conversion parts. Petitioner refutes the district court's ruling that an auto sear is a combination of parts sufficient to implicate the definition by Congress of "machinegun" for purposes of the Government's prosecution of Mr. Was.

Point I. The legislative history of Section 5845(b) contradicts the district court's ruling that an auto sear is a machinegun.

The "any combination of parts" language of Section 5845(b) was a result of an amendment in 1968 to the National Firearms and Gun Control Act of 1968. The legislative history for said amendment reads in relevant part:

> The present National Firearms Act covers gangster-type weapons such as machineguns, sawed-off shotguns, short-barreled rifles, mufflers, and silencers. Under the amendment it would also cover machinegun frames and receivers, so-called "conversion kits" for turning other weapons into machineguns, and combinations of machinegun parts when in the possession of a single person.

1968 U.S. Code Cong. and Adm. News at 4434.

Thus, the amendment introduced three additional and independent definitions of machinegun. The district court held that the auto sear was included within the amended definition of Section 5845(b) which reads "any combination of parts designed and intended for use in converting a weapon into a machinegun." *Id.* If the preceding is correct, then the

auto sear can be deemed to be a "conversion kit" as that term is cited in the preceding legislative history because it corresponds to the relevant part of the definition of machinegun which is at issue in this appeal (Section 5845(b)). Petitioner maintains that an auto sear cannot be deemed to be a "conversion kit" merely because it is physically made up of more than one piece. The correct reading of the statute when understood in light of the relevant legislative history indicates the intent of Congress to reach those "combination of parts" which were sold for one purpose — to supply the necessary *parts* to convert a semi-automatic weapon into a machinegun. The legislative history makes it clear that the problem of "conversion kits" was being addressed by Congress and the resulting amendment to the National Firearms Act made it illegal to sell those parts necessary to convert a weapon into a machinegun. Thus, the legislative history contraducts the district court's ruling that an auto sear, i.e., a single part, can constitute a "conversion kit" or "any combination of parts designed and intended for use in converting a weapon into a machinegun."

Point II. The 1986 amendment to Section 5845(b) further contradicts the district court's ruling that an auto sear is a machinegun.

Section 5845(b) was amended a second time in 1986 by Public Law 99-308 Section 109. The definition of machinegun was changed by including the following additional language:

> . . . any part designed and intended solely and exclusively for use in converting a weapon into a machine gun . . .

The purpose of this amendment, as explained in the conference report, was to control the sale of "incomplete conversion kits" that circumvented the prohibition on selling completed conversion kits. 1986 U.S. Code Cong. and Adm. News at 1354. That is to say, as a result of the 1986

amendment, Congress made it illegal to transfer, sell, or possess "a single part which is solely and exclusively designed and intended for use in converting a weapon into a machinegun." The statute (5845(b)) still retains the language which pertains to "any combination of parts . . ." (the 1968 amendment) but now also includes the relevant language discussed above which addresses the single gun part problem which was not covered by the previous amendment. Petitioner maintains that the auto sear is a single gun part or, as referred to by Congress in the 1986 amendment, "an incomplete conversion kit" and it was not illegal to possess, sell, or transfer the same until the amendment to Section 5845(b) in 1986. (The acts of the Petitioner took place prior to the amendment of the statute by Congress in 1986.)

Point III. The scientific report prepared by the Firearms Technology Branch of the Bureau of Alcohol, Tobacco and Firearms supports Petitioner's contention that an auto sear is a single gun part and not a combination of parts.

The Government as part of its case against Petitioner at the trial court produced a technical report from the Firearms Technology Branch of the Bureau of Alcohol, Tobacco and Firearms (see record — supplemental appendix to Brief for Appellee at Page A1). The report classified an AR-15 auto sear as a machinegun despite the fact that it made a finding that it was a single gun part and could not convert a weapon into a machinegun unless it was put into a weapon in combination with other gun parts necessary to complete the conversion process. The Government's report contained the following findings:

> **FINDINGS:** Exhibit 1 (auto sear) is a part designed and intended for use in converting a semi-automatic AR-15 type rifle into a machinegun. For test purposes, Exhibit 1 was installed in a semi-automatic

AR-15 rifle receiver which was fitted with the following parts designed and intended for use in the M-16 machinegun: M-16 hammer, M-16 trigger, M-16 selector, M-16 disconnector, and M-16 bolt carrier. Test firing revealed that the auto sear functioned as designed by controlling the hammer fall during the automatic fire mode.

Petitioner contends that the Government's scientific report supports his position that an auto sear is not a "combination of parts" and thus contradicts the district court's ruling that the auto sear is a machinegun. First, the report unequivocally states that the auto sear is a *part* (not a combination of parts) designed and intended for use in converting a weapon into a machinegun. If the auto sear is a part, then how could it be a "combination of parts" and fall within the scope of Section 5845(b) (pre-1986 amendment). Second, the report stated that the auto sear was installed into an AR-15 semi-automatic rifle with other parts necessary to convert the weapon into a machinegun. Upon said installation, the rifle was converted into a fully automatic weapon. If the preceding is correct, then the auto sear will convert a weapon into a machinegun only if other parts are already present. Thus, the auto sear in and of itself is not capable of converting a weapon into a machinegun.

(2) The Statute, Section 5845(b), is fatally ambiguous because it requires one to speculate as to its meaning and thus violates the Due Process Clause of the Fifth Amendment.

The phrase "any combination of parts designed and intended for use in converting a weapon into a machinegun" is susceptible to two equally plausible readings. First, the phrase could refer to several distinct parts necessary for conversion of a weapon into a machinegun, i.e., M-16 hammer, M-16 trigger, M-16 selector, M-16 disconnector, and M-16 bolt carrier (see record — supplemental appendix to Appellee's Brief at page A1). Second, said phrase could refer to the component pieces of the part, i.e., an auto sear, housing, sear, spring, and roll pin (see record — Brief of Appellee at Page 6). Thus, if the district court's interpretation of the statute is

plausible, then the statute is fatally ambiguous since the same conduct, possession and/or transfer of an auto sear would be criminalized by one plausible reading and would be legal pursuant to an alternate but equally plausible reading. Thus very different conduct would be penalized, depending on whether one reads the statute as referring to distinct parts which when in combination with others will convert a weapon into a machinegun or whether it refers to the component pieces of a single gun part, i.e., AR-15 auto sear.

Clearly, reasonable men have differed on the meaning of the statute, but that is not acceptable for a criminal statute. "A penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. . . ." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), cited in *United States v. Anzalone*, 766 F.2d 676, 678 (1st Cir. 1985). An individual cannot be required to speculate as to which of two possible readings of a statute is controlling. *Dunn v. United States*, 442 U.S. 100, 112 (1979); *United States v. Anzalone, supra*, at 678.

The fact that Section 5845(b) is susceptible to two plausible readings is therefore objectionable as a violation of the Due Process Clause of the Fifth Amendment. Petitioner had a right to be informed of the nature and cause of the accusation and that in effect the statute delegated to the district court the legislative power to determine which acts shall be criminal. *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921); 21 Am.Jur. Criminal Law, Section 15 (1969).

The district court, by holding that an auto sear is a "combination of parts designed and intended to convert a weapon into a machinegun," either judicially amended the old statute to read as does the legislatively amended statute, or it made the amended statute retroactive. Either action would be improper with regard to a criminal statute; the former because the legislature, not the courts, should define criminal activity; *United States v. Bass*, 404 U.S. 336, 348 (1971); the latter because it would deprive the Petitioner of

fair notice (see *id.*) and would violate the Ex Post Facto Clause of the Constitution as applied through the Due Process Clauses of the Constitution.

The Petitioner contends that Congress nowhere intended, nor did it clearly state, that auto sears, whether individually or collectively, should constitute a firearm, more particularly, a "machinegun" as that term is defined in 26 U.S.C. Section 5845(b). To construe the meaning of the term "machinegun" to encompass one single gun part, such as the auto sear of the AR-15 rifle, would be to construe the term "firearm" beyond any recognition of its plain or reasonably intended meaning. The statute does not state with sufficient specificity the conduct which is to be proscribed. It has long been held to be the duty of a court to require the legislature to state with specificity the reaches of a criminal statute, and thus a court "must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed." *Dunn v. United States, supra,* at 112-113, and cases cited. Since questions regarding the reach of a criminal statute must be resolved in favor of lenity, *United States v. Bass, supra,* at 347; *Dunn v. United States, supra,* at 112, any ambiguity in a criminal statute must be resolved in favor of the Petitioner, *United States v. Bass, supra; United States v. Anzalone, supra,* at 681. The ambiguity in the above statutes must be resolved in favor of Mr. Was.

CONCLUSION

The district court erred in holding that as a matter of law an AR-15 auto sear is a machinegun because it is comprised of component pieces and therefore can be a combination of parts for purposes of Section 5845(b). Further, the district court erred by its holding that an auto sear is a "combination of parts . . ." and thereby created a fatal ambiguity within Section 5845(b) making it violate the Due Process Clause of the Fifth Amendment and Ex Post Facto Clause of the United States Constitution.

For the reasons cited above, Petitioner respectfully requests that the Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

THE PETITIONER
BRYAN N. WAS

BY: CHARLES A. MAGLIERI
Counsel of Record
BARALL AND MAGLIERI
40 Wintonbury Mall
Bloomfield, CT 06002
(203) 242-0771
Application pending for
Membership to the
Bar of this Court

BY: F. MAC BUCKLEY
Counsel of Record
BUCKLEY AND SANTOS
51 Russ Street
Hartford, CT 06106
(203) 249-6548
Member of the Bar of
this Court

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

BRYAN N. WAS, ET AL.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Decision and Judgment of United States Court of Appeals for the Second Circuit Rendered on February 13, 1989 . . . . . 1A

District Court's Ruling on Defendant's Motion to Dismiss Rendered on April 25, 1988 . . . . . 5A

Defendant's Motion to Dismiss Filed on February 9, 1988 . . . . . 14A

Nos. 88-1402, 88-1403

UNITED STATES OF AMERICA	:	UNITED STATES COURT OF APPEALS FOR THE
V.		SECOND CIRCUIT
BRYAN N. WAS	:	FEBRUARY 13, 1989

DECISION AND JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT RENDERED ON FEBRUARY 13, 1989

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 769, 890—August Term, 1988

(Argued: February 6, 1989 Decided: February 13, 1989)

Docket Nos. 88-1402, -1403

UNITED STATES OF AMERICA,

Appellee,

—v.—

BRYAN N. WAS and NORMAN WAS,

Defendants-Appellants.

Before:

KEARSE and WINTER, *Circuit Judges*,
and LEVAL, *District Judge*.*

Appeals from judgments of conviction entered in the United States District Court for the District of Connecticut, Peter C. Dorsey, *Judge*, for firearms violations, 26

* Honorable Pierre N. Leval, Judge of the United States District Court for the Southern District of New York, sitting by designation.

U.S.C. §§ 5845, 5861(e), 5871; 18 U.S.C. § 371. *See* 684 F. Supp. 350 (1988).

Affirmed.

PETER D. MARKLE, Assistant United States Attorney, New Haven, Connecticut (Stanley A. Twardy, Jr., United States Attorney for the District of Connecticut, on the brief), *for Appellee.*

CHARLES A. MAGLIERI, Bloomfield, Connecticut (Barall & Maglieri, Bloomfield, Connecticut, on the brief), *for Defendant-Appellant Bryan N. Was.*

F. MAC BUCKLEY, Hartford, Connecticut (Buckley & Santos, P.C., Hartford, Connecticut, of counsel), *for defendant-appellant Norman Was, joined in the brief of defendant-appellant Bryan N. Was.*

PER CURIAM:

Defendants Bryan N. Was and Norman Was appeal from judgments of conviction entered in the United States District Court for the District of Connecticut, Peter C. Dorsey, *Judge*, following their conditional pleas of guilty to firearms offenses. Bryan Was pleaded guilty to one count of transferring a firearm that was a machinegun within the meaning of 26 U.S.C. § 5845(b) (1982), in violation of *id.* §§ 5861(e) and 5871 (1982 & Supp. II 1984);

both defendants pleaded guilty to one count of conspiring to transfer such firearms, in violation of 18 U.S.C. § 371 (1982). On appeal, defendants contend principally that the district court should have dismissed the indictment on the ground that the items they transferred, known as "auto sears," as a matter of law cannot be deemed machineguns within the meaning of § 5845(b) because an auto sear is not a "combination of parts designed and intended for use in converting a weapon into a machinegun," 26 U.S.C. § 5845(b).

We reject defendants' arguments and affirm the judgments of conviction substantially for the reasons stated in the opinion of the district court, reported at 684 F. Supp. 350 (1988).

No. H-87-79

UNITED STATES OF AMERICA	: UNITED STATES DISTRICT COURT
V.	DISTRICT OF CONNECTICUT
BRYAN N. WAS	: APRIL 25, 1989

DISTRICT COURT'S RULING ON MOTION TO DISMISS RENDERED ON APRIL 25, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
—vs—	:	Criminal No. H-87-79 (PCD)
BRYAN WAS NORMAN WAS	:	

RULING ON MOTION TO DISMISS

Facts

Defendants, Bryan and Norman Was, were indicted on December 23, 1987, for conspiracy to sell, sale, and possession of firearms in violation of the National Firearms Act ("Act"), 26 U.S.C. §§ 5845(b), 5861(e), 5871, and 18 U.S.C. § 371. Count One alleges that defendants conspired to transfer firearms, namely three machine gun auto sears, in violation of 26 U.S.C. §§ 5861(e), 5845, 5871[1] and 18 U.S.C. § 371. Counts

---

[1] 26 U.S.C. § 5861(e) provides:

It shall be unlawful for any person —

. . . . .

(e) to transfer a firearm in violation of the provisions of this chapter;

. . . . .

26 U.S.C. § 5845, at the time of the alleged offense, provided in part:

For the purposes of this chapter —

(a) Firearm. The term "firearm" means . . . (6) a machinegun;

. . . . .

(b) Machinegun. — The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed

(continued)

Two and Three allege that defendants knowingly transferred, on two separate dates, firearms as defined in 26 U.S.C. § 5845(b), without payment of the transfer tax required by § 5811 and without filing an application for transfer of such weapons with the Secretary of the Treasury as required by § 5812. Count Four charges defendant Bryan Was with the unlawful possession of an unregistered firearm as defined in § 5845(b), namely a Colt AR-15 model SP1.223 fully automatic rifle, in violation of §§ 5861(d) and 5871.

On February 9, 1988, defendants moved to dismiss Counts One, Two and Three pursuant to Fed. R. Crim. P. 12(b)(2). Defendants aver that these charges fail to state an offense for which they may be prosecuted because the sale of an auto sear alone does not constitute the sale or transfer of a "machinegun" as defined in § 5845(b) of the Act. Accordingly, defendants argue that they cannot be prosecuted for the sale or conspiracy to sell a machine gun nor for the failure to file an application for transfer, or pay a transfer tax on a machine gun.

---

[1] *(continued)*

and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

However, effective November 15, 1986, § 5845(b) was amended to provide:

(b) Machinegun. — The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

This amendment does not apply to the indictment at issue.

26 U.S.C. § 5871 provides that violations of this section shall be punishable by maximum fine of $10,000 or maximum term of imprisonment of ten years, or both.

The crux of defendants' argument is that an auto sear is not a "combination of parts designed and intended for use in converting a weapon into a machinegun" as defined in § 5845(b). Defendants also make a due process argument, asserting that § 5845(b) is ambiguous and, therefore, must be constructed in their favor.

Law

A motion to dismiss an indictment is proper when it may be decided solely upon issues of law. *See, e.g., United States v. Poczik*, 362 F. Supp. 101, 102 (W.D.N.Y. 1973); *United States v. Martinez*, 350 F. Supp. 971 (W.D. Pa. 1972). The court must dismiss an indictment prior to trial if it fails to allege facts which constitute the proscribed offense. *United States v. Coia*, 719 F.2d 1120 (11th Cir. 1983), *reh'g denied*, 724 F.2d 978 (11th Cir.), *cert. denied*, 466 U.S. 973 (1984).

When a statute is subject to varying interpretations, "an ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity." *Huddleston v. United States*, 415 U.S. 814, 831 (1974); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955). This practice is firmly grounded in the "principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979), citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Conduct which is punishable must be plainly and unmistakably proscribed. *United States v. Gradwell*, 243 U.S. 476, 485 (1917). In deciding whether a statute is susceptible to more than one interpretation, the court must necessarily review the meaning of the statutory language and legislative intent. *See, e.g., Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (examining text and history of statute); *United States v. Brown*, 333 U.S. 18 (1948) (same). The construction and interpretation of a statute is a judicial function. *See Walt*

Disney Prod. v. United States, 327 F. Supp. 189, 191-92 (C.D. Cal. 1971).

The legislative intent must be distinguished from the facial meaning of a statute in considering whether it is ambiguous. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring); *see also* Holmes, *Collected Legal Papers*, 207 (New York 1920) (objective literal meaning of statute is valid alternative to inquiry into legislative intent). The interpretation urged by the government must be supported by common usage, dictionary definition, or court decision to be upheld. *Torti v. United States*, 249 F.2d 623, 625 (7th Cir. 1957). If no ambiguity exists, the court may not determine the literal sense of the statute from the legislative history or circumstances surrounding its enactment. *Id.*

Since the construction and interpretation of a statute is a judicial function, when administrative and judicial interpretations conflict, the latter must prevail. *See Barlow v. Collins*, 397 U.S. 159, 166 (1970) (where the only or principal dispute relates to the meaning of a statutory term, the controversy presents an issue on which the courts, not the administrators, are more expert). Whether a statute is subject to varying construction, an interpretive ruling is of limited effect. *See Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) (interpretive ruling which is out of harmony with the statute is a mere nullity). The correctness of an agency's interpretation is supported when Congress, with full knowledge of the agency's interpretation, has made significant additions to the statute without departing from the agency's view. *Farmers Educ. & Co-op Union v. WDAY, Inc.*, 360 U.S. 525, 533 (1959).

Discussion

"Combination of Parts"

At the time of defendants' allegedly illegal act, § 5845(b) of the Act defined "machinegun" to include a "combination of parts designed and intended for use in converting a weapon into a machinegun."[2]

Defendants argue that, in defining a machine gun to include "any combination of parts designed and intended for use in converting a weapon into a machinegun," § 5845(b) is susceptible of two meanings, only one of which would include an auto sear within the definition.[3] Defendants' first construction treats the "designed and intended" language as referring to a combination of "parts," each of which is *itself* "designed and intended for use in converting a weapon into a machinegun;" i.e., more than one machine gun part. The other possible construction interprets the clause to refer to a "combination of parts," which, *as a group,* is "designed and intended for use in converting a weapon into a machinegun;" i.e., a so-called "conversion kit." Defendants argue that, under the first construction, a single auto sear, even if proven to be "designed and intended" for the prohibited use, cannot be a "combination" of such parts and thus cannot be a machine gun.

Defendants' first construction of the statute is unconvincing and unreasonable. This reading would make the words

---

[2] An auto sear is clearly neither "the frame or receiver" of a machine gun, nor a "combination of parts from which a machinegun can be assembled." *See* § 5845(b) (1968). The clause cited in the text is the only portion of the statutory definition which is advanced by the government to apply to the auto sear at issue in this case. *See* Government's Memorandum at 3, citing Bureau of ATF Ruling 81-4.

[3] Even if it were susceptible of two interpretations, the statutory definition is sufficiently precise to give reasonable notice as to what is forbidden. It is, therefore, not unconstitutionally vague. *United States v. Campbell,* 427 F.2d 892, 893 (5th Cir. 1970); *see also United States v. Morningstar,* 456 F.2d 278, 281 (4th Cir. 1972) (construing § 5845(f)).

"combination of" in the clause superfluous, since it could be stricken without changing the sense of the meaning. A statute is to be interpreted so as to give effect to every word, clause, and sentence of a statute if possible. *Carey v. Local Board No. 2*, 297 F. Supp. 252 (D. Conn.), *aff'd*, 412 F.2d 71 (2d Cir. 1969). The use of the phrase "combination of parts" in the third clause of the sentence also supports the interpretation that the phrase should be read as a whole and that the rest of the clause modifies "combination of parts" and not merely "parts."

Moreover, the legislative history does not support such a reading. The cited language of § 5845(b) was the result of amendments in 1968 in the Gun Control Act of 1968, P.L. 90-618. The House-Senate Conference report on the 1968 Gun Control Act explained:

> The present [pre-amendment] National Firearms Act covers gangster-type weapons such as machineguns, ... Under the amendment it would also cover machine gun frames and receivers, so-called "conversion kits" for turning other weapons into machineguns, and combinations of machinegun parts when in the possession of a single person.

1968 U.S. Cong. & Adm. News, Vol. 3 at 4434 (Conference Report No. 1956, Oct. 9, 1968), accompanying P.L. 90-618. This comment makes clear that the three clauses of the second sentence of § 5845(b) are meant to be read disjunctively, so that each clause states an additional and independent definition of a machine gun. *Cf. United States v. Fisk*, 70 U.S. 445, 447 (1865) ("and" may be read as "or" when necessary to make statute consistent with legislative purpose); *Detroit Edison Co. v. SEC*, 119 F.2d 730, 738 (6th Cir.) (meaning may be established by words, context, subject matter, effect, and spirit of statute), *cert. denied*, 314 U.S. 618 (1941). The third clause concerns machine gun parts when in possession of a single person. The second clause regulates any combination of parts of any kind, where the *combination*

is "intended to be used to convert a weapon into a machinegun." *See United States v. Campbell*, 427 F.2d 893, 894 (5th Cir. 1970) (conversion kits sold by defendant were "designed and intended for use" in converting M-1 carbine into machine gun), *cert. denied*, 402 U.S. 975 (1971).

Defendant concedes that the AR-15 auto sear is physically made up of more than one part.[4] The auto sear thus cannot be excluded from the ambit of the "combination of parts" portion of the second clause of § 5845(b). However, defendant argues that, even if an auto sear is a "combination of parts," it is not capable of converting a weapon into a machine gun and thus, as a matter of law, is not "designed and intended for use in converting a weapon into a machinegun." The government disputes this claim. In support of its contention that an auto sear is "designed and intended" for the regulated use, the government introduces an interpretive ruling of the Bureau of Alcohol, Tobacco and Firearms ("ATF"). ATF Ruling 81-4 states that the Bureau has examined an auto sear and "finds that the single addition of this auto sear to certain AR 15 type semi automatic rifles, manufactured with M16-internal components already installed, will convert such rifles into machineguns." (Exhibit 9). In addition, the government produces two technical reports from the Firearms Technology Branch of ATF, stating that the auto sears functioned to convert a semiautomatic AR-15 rifle receiver to a machine gun. Exhibits 7, 8. Thus, the government claims that each auto sear, by itself, constitutes a complete "conversion kit," capable of converting an AR-15 rifle to a fully automatic rifle without any additional parts. Government's Memorandum at 2. Whether the auto sears allegedly sold by defendants are in fact "designed and intended for use in converting a weapon into a machinegun"

---

[4] The government has taken conflicting positions as to what these parts are to be called. *Compare* AFT Ruling 81-4 (auto sear consists of sear mounting body, sear, return spring, and pivot pin) *with* Government's Memorandum at 1 (listing auto sear housing, auto sear, spring and roll pin). However, the nomenclature is irrelevant to the issue of whether an auto sear is a "combination of parts."

is, therefore, a question for proof at trial and cannot be decided as a matter of law. *See Campbell*, 427 F.2d at 894 (proof at trial showed "conversion kits" were designed and intended for use in converting a standard M-1 carbine into a machine gun); *cf. Ballew v. United States*, 389 F. Supp. 47, 55 (D. Md. 1975) (discussing proof that grenades and gunpowder were "designed and intended to be used as destructive devices" in violation of 18 U.S.C. § 5845(f)), *aff'd*, 539 F.2d 705 (4th Cir. 1976).

Accordingly, the motion to dismiss is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 25th day of April, 1988.

/s/ Peter C. Dorsey

Peter C. Dorsey
United States District Judge

No. H-87-79

UNITED STATES OF AMERICA	: UNITED STATES DISTRICT COURT
V.	DISTRICT OF CONNECTICUT
BRYAN N. WAS	: FEBRUARY 9, 1989

DEFENDANT'S MOTION TO DISMISS
FILED ON FEBRUARY 9, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA CRIMINAL NO. H-87-79 (PCD)

VS.

BRYAN N. WAS FEBRUARY 8, 1988

MOTION TO DISMISS INDICTMENT WITH MEMORANDUM OF LAW

The above-named accused, pursuant to Federal Rules of Criminal Procedure, Rule 12(b)(2) *(Pleadings and Motions Before Trial: Defenses and Objections.)* respectfully motions this Court for an order of dismissal of Counts One, Two and Three of the Government's indictment dated December 23, 1987 alleging his violation of:

a. Count One — 26 USC Section(s) 5845, 5861(e), 5871 and 18 USC 371;

b. Count Two — 26 USC Section(s) 5845(b), 5811, 5812, 5861(e), 5871 and;

c. Count Three — 26 USC Section(s) 5845(b), 5811, 5812, 5861(e) and 5871;

in that the Government fails to state an offense for which the accused may be prosecuted.

The accused argues hereby that the sale of one or more "auto sears", without more, does not constitute the sale or transfer of "machine gun" as that term is defined in 26 USC 5845(b) and further, that if such item does not constitute a machine gun, then the accused need not file to register or pay any tax on the same.

WHEREFORE, the accused respectfully requests that this Court enter an order dismissing Counts One, Two, and Three of the Government's indictment, pursuant to the principals of law discussed in the memorandum attached hereto and made a part hereof.

THE DEFENDANT,
BRYAN N. WAS

BARALL AND MAGLIERI

By /s/ Charles A. Maglieri
Charles A. Maglieri

ORDER

The foregoing Motion to Dismiss Indictment with Memorandum of Law having been heard, it is hereby ORDERED: GRANTED/DENIED this day of , 1988.

BY THE COURT

_____
Clerk/Judge

REQUEST FOR ORAL ARGUMENT

The accused hereby respectfully requests oral argument on his Motion to Dismiss.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA CRIMINAL NO. H-87-79 (PCD)

VS.

BRYAN N. WAS FEBRUARY 8, 1988

CERTIFICATION

The undersigned hereby certifies that a copy of the foregoing Motion to Dismiss Indictment with Memorandum of Law has been mailed to the attorney of record for the United States Government and counsel for the co-accused, as named below, postage prepaid, First Class Mail, this 9th day of February, 1988.

James G. Genco, AUSA
United States District Court
450 Main Street
Hartford, CT

F. Mac Buckley, Esq.
Buckley & Santos, P.C.
51 Russ Street
Hartford, CT 06106

/s/ Charles A. Maglieri
Charles A. Maglieri